(17)

No. 95-809

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

LOCKHEED CORPORATION, et al.,
Petitioners,
v.
PAUL L. SPINK,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondent argues that the Ninth Circuit's decision should be affirmed on both issues presented in this case. On the first issue -- whether Lockheed violated the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, by amending the terms of its pension Plan to create a new benefit -- respondent contends that a plan sponsor's decision to amend its plan is fiduciary conduct, despite abundant case law to the contrary. There is no statutory basis for holding either that a plan sponsor violates ERISA § 406 when amending its plan to increase benefits, or that the plan administrator breaches a fiduciary duty when paying the benefits mandated by following the non-discretionary terms of that amendment.

On the second issue -- whether the new pension benefit accrual rules adopted by the Omnibus Budget Reconciliation Act of 1986 ("OBRA 1986") apply retroactively -- respondent contends that the Ninth Circuit correctly applied *Landgraf v. USI Film Products*, ___ U.S. ___, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994), in finding that the statute applies retroactively. This is based upon an interpretation of statutory language which unnecessarily strains the bounds of the English language, and also requires the Court to overlook the contrary administrative interpretation of the same statutory language by the Internal Revenue Service ("IRS"), the agency which concededly has authority for enforcing this provision of OBRA 1986.

I. WHETHER "IMPLEMENTATION" OF A LAWFUL PLAN AMENDMENT CONSTITUTES A BREACH OF FIDUCIARY DUTY IS FAIRLY INCLUDED WITHIN THE SCOPE OF THE ISSUES PRESENTED.

Respondent and his *amici* initially argue that the Court should limit its inquiry to the question of whether Lockheed

breached a fiduciary duty by amending the Plan to create a new pension benefit conditioned upon a waiver of employment claims, and refuse to decide the subsidiary issue of whether the Plan's fiduciaries (*i.e.*, the members of the Retirement Committee who were named as defendants in the Complaint and who are also petitioners in this Court) could somehow breach a fiduciary duty by "implementing" the non-discretionary terms of the amended Plan even if the amendment is lawful. Respondent's Brief at 5-6. Respondent's argument should be rejected, because he has consistently taken the position both in this Court and in the courts below that there is no meaningful distinction between the lawfulness of amending the Plan and administering the Plan as amended.

The district court expressly held that there was no distinction between amending the Plan and administering the terms of the lawfully amended Plan.[1] Respondent did not challenge this holding on appeal and the court of appeals did not question the district court's reasoning on this point. J.A. at 87-91. Respondent similarly failed to draw any distinction between plan amendment and implementation of a lawful plan amendment at the petition stage in this Court, apparently accepting petitioners' argument that there was no meaningful difference between the two concepts. Petition at 12 n. 5; Petitioner's Reply Brief at 5 n. 4. The argument that "implementation" of a lawful plan amendment could constitute a fiduciary breach was first raised by the United States, and even now respondent argues that it would be a "false

[1] The district court held that "[t]he Court views the subsequent payment of enhanced benefits to selected participants as merely [Lockheed's] adherence, in its role as Plan administrator, to the terms of the lawfully amended Plan. As such, [respondent] *fails to allege facts to state a breach of fiduciary duty under ERISA independent of the amendment's substantive provisions.*" J.A. at 69 (emphasis added).

distinction" to differentiate between the lawfulness of amending the Plan on the one hand and implementing the terms of the amended Plan on the other. Respondent's Brief at 7.

Petitioners agree that there is no meaningful distinction between the lawfulness of amending the Plan as opposed to implementing the non-discretionary terms of the amended Plan, *i.e.*, paying benefits to eligible participants. If the first is lawful, so is the second. Other than the United States, the other parties and their *amici* agree with this concept, and instead focus their argument on whether the Plan amendment violated ERISA § 406 by creating new pension benefits for participants who voluntarily choose to receive them subject to certain eligibility criteria, including execution of a release of employment-related claims. Whether framed as a separate issue or incorporated within the question of whether Lockheed violated § 406, the issue of whether "implementation" of the non-discretionary terms of Lockheed's lawfully amended Plan may result in a breach of fiduciary duty is subsidiary to, and fairly included within, the scope of the questions presented in the Petition.

II. AMENDING A PLAN TO INCREASE PENSION BENEFITS IS NOT FIDUCIARY CONDUCT, AND THE PLAN'S FIDUCIARIES BREACH NO DUTY BY FOLLOWING THE NON-DISCRETIONARY TERMS OF THAT AMENDMENT.

Two significant points are apparent from respondent's arguments. First, neither he nor his *amici* defend a central element of the Ninth Circuit's decision: that a violation of ERISA § 406 can occur in the absence of fiduciary conduct. J.A. at 88 n.5. Instead, respondent seems to recognize that § 406 regulates fiduciary conduct, and cannot be violated unless a fiduciary breaches a fiduciary duty.

Second, it is quite clear that the real issue which bothers respondent is not the fact that extra pension benefits were paid to employees who elected voluntary retirement, but that those employees were required to confirm the voluntary nature of their retirement by signing a release as a condition of receiving extra pension benefits. In other words, respondent seeks the benefit of the Plan amendment without the burden of its eligibility criteria. Respondent and his *amici*, such as the National Employment Lawyers Association ("NELA"), would prefer a rule that permits employees to "voluntarily" retire, receive extra pension benefits, and then sue their ex-employer for constructive discharge, violation of the ADEA, or a myriad of other employment-related claims. Although this may seem ideal to the plaintiffs' employment bar, it is not a scenario envisioned by employers who offer early retirement programs. There is nothing in ERISA which prohibits an employer such as Lockheed from taking steps, when creating new and additional benefits to which employees are not otherwise entitled, to ensure that this does not happen, regardless of whether the issue is viewed as one of plan design and amendment or non-discretionary plan implementation.

A. Amending A Plan To Increase Benefits Is Not A Fiduciary Function and Does Not Give Rise To A Prohibited Transaction.

Respondent does not dispute that the eligibility conditions for the new benefit created by Lockheed fully satisfy ERISA's minimum participation, funding, and vesting requirements. He also acknowledges that this Court recognized in *Curtiss-Wright Corp. v. Schoonejongen*, __ U.S. __, 115 S. Ct. 1223, 1228, 131 L. Ed. 2d 94 (1995), that a welfare plan sponsor acts in a settlor, rather than fiduciary, capacity when amending an ERISA plan. Although not acknowledged by respondent, the same principle was recognized by both the majority and the dissenting opinions in

Varity Corp. v. Howe, __ U.S. __, __ S.Ct. __, 134 L. Ed. 2d 130 (1996), slip op. at 8, 15; dissent at 16.

Respondent attempts to reconcile his argument with *Curtiss-Wright* and *Varity* by suggesting that the plan sponsor's decision to amend a *pension* plan should be considered a fiduciary act, even though amending a *welfare* plan is not. Respondent's Brief at 15. This distinction finds no support in ERISA. The fiduciary standards of ERISA (including the prohibited transaction rules in § 406) apply with equal force to both pension and welfare plans. *See* 29 U.S.C. § 1101; *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983). Although it is true that § 406 may have no relevance to an unfunded welfare plan since an unfunded plan has no assets, and without any assets there can be no transaction, respondent overlooks the fact that not all welfare plans are unfunded. Respondent's Brief at 15 n.22. Funded welfare plans do exist; for example, most multi-employer plans that provide welfare benefits are funded, and the prohibited transaction rules in § 406 apply to such plans with the same force as they do to a pension plan. Moreover, other fiduciary rules exist which apply to all plans, funded or unfunded, pension or welfare. *E.g.*, 29 U.S.C. §§ 1104(a)(1)(A), (B), (D). In short, it makes no sense to accept respondent's invitation to create a different set of fiduciary standards for pension and welfare plans when the same statutory provisions apply to both. The United States agrees with Lockheed on this point, stating that "[a] plan sponsor does not act as a fiduciary when it creates, amends, or terminates a pension plan." Brief for the United States at 9.

Respondent nonetheless argues that Lockheed acted as a fiduciary when it amended the Plan because the act of amendment "exercised actual control over the disposition of plan *assets*." Respondent's Brief at 17 (emphasis added). This argument ignores the text of ERISA. The Plan amendment only changed Lockheed's

promise to its employees and thus increased the Plan's *liabilities* to pay increased benefits to retiring employees. There was absolutely no change in the form, content or amount of the Plan's assets or the way they are invested. ERISA expressly recognizes that plan assets are different than plan liabilities. *E.g.*, 29 U.S.C. § 1023(b)(2) (annual report must include "a statement of assets and liabilities . . ."); 29 U.S.C. §§ 1002(25), (29), (30) (defining different types of "liabilities"). Respondent ignores this fundamental distinction between a plan's assets and its liabilities, and also ignores the fact that ERISA's fiduciary rules in general (and the prohibited transaction rule in particular) focus on the investment and disposition of plan assets. *E.g.*, 29 U.S.C. § 1106(a)(1)(D) (prohibiting the transfer to, or use by, a party in interest "of any *assets* of the plan") (emphasis added). Although respondent acknowledges that ERISA § 406 is intended "to safeguard the financial integrity of plans," Respondent's Brief at 8 n.10, he ignores the fact that the Plan amendment in this case did not in any way jeopardize the Plan's financial integrity: plan assets were used as intended to pay benefits to Plan participants.

The creation of a new plan benefit is a settlor function where the employer creates a new plan liability and thus does not act as a fiduciary.[2] So long as the employer satisfies the minimum funding, participation, and vesting standards of ERISA it is free to establish the terms and conditions of the new benefit promise. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981) ("the private parties, not the Government, control the level of benefits . . . "). Indeed, respondent seems to recognize that

[2] There is a good reason for this rule. The employer must fund the plan, and if for any reason the plan is not fully funded the employer must make up the difference even when the shortfall results from stock market setbacks, pensioners living longer lives than expected, or other matters beyond the control of the employer.

Lockheed would be free to adopt a *new* pension plan or funded welfare plan with the same eligibility criteria as the 1990 Plan amendment, Respondent's Brief at 21 n.30, even though there is no logical distinction between adopting a new plan and amending an existing one in these circumstances.

Respondent's argument to the contrary uses flawed reasoning: he argues that plan amendment must be a fiduciary function because the plan fiduciaries must comply with ERISA when administering the plan.[3] Respondent's Brief at 17-19. The latter proposition may well be an accurate description of discretionary plan administration, *see* 29 U.S.C. § 1104(a)(1)(D), but it does nothing to prove that plan amendment itself is a fiduciary function. What respondent overlooks is that because amending a plan to create a new pension benefit is not a fiduciary act, it cannot be declared "illegal" as a prohibited transaction under § 406 or any other part of ERISA which regulates fiduciary conduct.[4]

[3] Both respondent and *amici* argue at some length that Lockheed is trying to "trump" ERISA by amending its Plan, but this is simply not true. Lockheed has not contended that, and this case does not present the issue of, whether a fiduciary is insulated from liability when following an illegal plan directive. Brief for Petitioners at 19 n.11. Instead, the legality of an amendment which creates new pension benefits subject to specified eligibility criteria must be determined from other parts of ERISA, most notably the participation and vesting requirements codified at 29 U.S.C. § 1051-61, and the funding requirements codified at 29 U.S.C. § 1081-86. Lockheed complied with all of these substantive requirements, a point which neither respondent nor his *amici* disputes.

[4] Respondent apparently concedes that § 406 does in fact regulate fiduciary conduct, since he makes no attempt to defend the Ninth Circuit's contrary holding that a § 406 violation can occur in the absence of a fiduciary breach. J.A. at 88 n.5. The United States similarly agrees with Lockheed on this point, stating that "the court of appeals erred in holding . . . that Lockheed violated Section 406(a)(1)(D) of ERISA when it adopted the 1990 Plan amendments." Brief for the United States at 11.

Respondent also argues that even if Lockheed did not fall within the statutory definition of a "fiduciary" when amending the Plan, it should nonetheless be deemed a fiduciary due to the language of the Plan.[5] Respondent's Brief at 23. Fiduciary status, however, depends upon whether the actor's conduct falls within the scope of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), not whether that conduct is labelled "fiduciary" or "non-fiduciary" by the plan document. In any event, the Plan unambiguously and expressly states that "[t]he *Corporation* reserves the right to amend . . . the Plan by action of the Board of Directors," J.A. at 48, thus confirming that the right to amend is reserved as a settlor rather than fiduciary function. *Curtiss-Wright*, 115 S. Ct. at 1227-28.

None of the cases cited by respondent change this conclusion. *Hickerson v. Velsicol Chemical Corp.*, 778 F.2d 365 (7th Cir. 1985), *cert. denied*, 479 U.S. 815 (1986), confirms that ERISA permits an employer to both amend and terminate a pension plan. *Id.* at 374-75. The court went on to hold that an ERISA violation may have occurred because the interest rate which accrued on undistributed plan assets was limited to the artificially low rate of 5% per annum, *id.* at 377-78, but this resulted either from a reduction in accrued benefits, *see* 29 U.S.C. § 1054(g)(1), or violation of the "prudent man" standard for investing plan assets. 29 U.S.C. § 1104(a)(1). *Hickerson* does not place any restrictions of a fiduciary nature on the plan sponsor's right to amend the plan, especially when the amendment *creates* a new benefit.

Amato v. Western Union Int'l Inc., 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986), similarly provides

[5] Respondent previously abandoned his claims for benefits under the terms of the Plan, J.A. at 63 n.1, so it is surprising that he would now base his remaining claim upon Plan language.

no support to respondent. *Amato* does recognize that a cause of action could be stated if the fiduciaries conspired with the plan sponsor to deprive participants of "pension benefits to which they are entitled," 773 F.2d at 1417, but the court went on to hold that this would occur only if the fiduciaries (1) diverted funds from the plan or (2) misled the participants through fraudulent misrepresentations. Neither claim is presented here: Lockheed's Plan has always satisfied the applicable funding requirements, and Lockheed truthfully and accurately described the conditions for the voluntary retirement program to its employees.[6]

B. Section 406 Does Not Regulate Benefit Payments Or Eligibility Criteria For Newly Created Benefits.

Respondent argues that Lockheed's amendment to the Plan violated ERISA § 406(a)(1)(D) because one of the eligibility criteria for the newly created pension benefit was that the participant release Lockheed from any employment-related claims as a condition of receiving new benefits. Respondent's Brief at 8. In making this argument, respondent contends that pension benefits payments made to participants, in accordance with the terms of the plan documents, are covered by the prohibited transaction rule. The United States makes a similar argument, albeit in connection

[6] *Delgrosso v. Spang & Co.*, 769 F.2d 928 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986), is inapposite because it involved a collectively-bargained plan where the employer had no contractual right to amend the plan during the term of the agreement. *Id.* at 935-36. Not surprisingly, the employer's attempt to amend the plan in violation of the union contract was held to violate any number of statutes, including ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1)(D). In this case, by contrast, the Plan expressly reserves to Lockheed the unilateral right to amend. J.A. at 48-49. *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978) is similarly distinguishable, because there the plan trustee used plan assets to purchase stock in the corporation which employed him, thus giving him the power to appoint other corporate officers, increase his own salary, and control the company until it collapsed due to his own mismanagement.

with its discussion of "implementation" of the Plan's terms rather than the Plan amendment itself. Brief for the United States at 15-16. Regardless of whether analyzed as plan amendment or implementation, the argument should be rejected because benefit payments are not included among the transactions prohibited by ERISA § 406, and that is why § 406 does not prohibit Lockheed from adopting the Plan amendment or bar the Plan fiduciaries from following the terms of the amended Plan.

The text of ERISA § 406 makes no reference to benefit payments. The United States nonetheless suggests that § 406(a)(1)(D) could be read (if given the most expansive construction permitted by the English language) to bring pension benefit payments required by the terms of the Plan within the scope of the prohibited transaction rule. Brief for the United States at 15. This presents an awkward and ultimately false problem, because the parties and their *amici* all agree that the "primary purpose of ERISA, after all, was to encourage and safeguard the payment of pension benefits." *Id.* at 16. *See also Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980) (purpose of ERISA is to ensure "that if a worker has been promised a defined pension benefit upon retirement -- and if he has fulfilled whatever conditions are required to obtain a vested benefit -- he actually will receive it"). To interpret § 406(a)(1)(D) in this manner would lead to absurd results, a point which no party disputes.

The best way to avoid this absurd result is to recognize that § 406(a)(1)(D) does not restrict benefit payments made by a plan to participants and beneficiaries.[7] The text of ERISA strongly

[7] The United States suggests another approach, contending that pension payments to former employees would fall outside the scope of § 406 because former employees do not fall within the definition of a "party in interest." 29

(continued...)

supports this conclusion. Section 406(a) expressly prohibits a plan from engaging in *other* types of specific transactions with the plan sponsor, including sales, leasing, loans, the furnishing of goods or services, the transfer of assets, or the acquisition of securities in or real property of the employer. 29 U.S.C. § 1106(a). Each of these transactions addresses the management and disposition of plan assets. Congress' underlying concern was that by these transactions the assets of the plan are put at risk and may not then be available for their intended purpose -- paying benefits. Benefit payments, by contrast, fall on the "liability" side of the plan's balance sheet, and are governed by entirely separate provisions of ERISA which do not include § 406.[8] In short, there is nothing in the text of the statute which suggests that § 406 regulates the eligibility criteria for benefit payments.

Commissioner v. Keystone Consolidated Industries, Inc., 508 U.S. 152, 113 S. Ct. 2006 (1993), similarly rebuts any argument that § 406 regulates benefit payments, since in that case the Court emphasized that Congress created a bright-line test when it enacted ERISA § 406. "Congress' goal was to bar categorically a transaction that was likely to injure the pension plan." 113 S. Ct. at 2012. It would contradict *Keystone* to now read § 406 as authorizing an *ad hoc* approach under which some benefit

[7] (...continued)
U.S.C. § 1002(14). This fails to take into account the fact that funded welfare plans pay benefits to current employees, who are parties in interest. 29 U.S.C. § 1002(14)(H). Adopting the United States' argument would effectively make it illegal for funded welfare plans to pay benefits, which is directly contrary to both the text and intent of ERISA and the very purpose of welfare plans.

[8] *See Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1189 (7th Cir. 1994) ("[29 U.S.C.] [s]ection 1002(21)(A)(i), in conjunction with §§ 1104 and 1106, requires trustees and other persons to deal with the assets of the plan in circumspect and prudent ways. It has nothing at all to say about the debit column of the balance sheet . . . "). *See also supra* at 6.

payments would be permitted and others prohibited depending upon the fiduciary's subjective evaluation of the eligibility criteria for such benefits. *Keystone* confirms that § 406 does not regulate benefit payments of any type, but was instead intended to prohibit other precisely specified uses of plan assets by the fiduciaries.

The mischief a standardless *ad hoc* approach will create is amply demonstrated by the varying and inconsistent rules of decision proffered by respondent, his *amici*, and the United States. NELA Brief at 7-8 (criticizing Solicitor General's test as "lax and unpredictable"). For example, respondent concedes that employers should continue to enjoy various "incidental benefits" of plan amendments which increase pension payments, such as (1) avoiding current cash outlays in the form of wages, (2) buying industrial peace by settling strikes and (3) reducing the risk of litigation by employees. Respondent's Brief at 11. But there is no meaningful difference between these "incidental benefits" and the benefit derived from eligibility criteria which includes a release of employment-related claims. If an employer may permissibly amend its pension plan to "reduc[e] the likelihood of lawsuits by former employees who receive early retirement benefits," *id.*, there is no reason not to eliminate altogether that risk by also requiring a release. *Cf. Meredith v. Navistar Int'l Transp. Corp.*, 935 F.2d 124, 126 (7th Cir. 1991) ("Not wanting to let Navistar's good deed go unpunished, Meredith sued Navistar under ERISA. Meredith claimed that Navistar . . . forc[ed] him into early retirement").[9]

The United States proposes a different, yet equally unworkable rule. The United States does not object to a release

[9] NELA, by contrast, proposes a more draconian standard that would either outlaw these "incidental benefits," or at the very least make them subject to litigation. NELA Brief at 8-9. NELA would presumably prohibit an employer from increasing pension benefits to settle a strike or strike-related unfair labor practices, or to condition an enhanced benefit upon a covenant not to compete.

per se, instead conceding that the plan sponsor could reasonably (and lawfully) condition the payment of enhanced pension benefits upon "a waiver of ADEA or other claims arising out of the early retirement itself . . ." Brief for the United States at 21. But once the United States acknowledges that a release of employment termination claims is permitted, it offers no principled explanation as to why § 406 should be read to prohibit a broader or different release.[10] This is because ERISA was not enacted for the purpose of regulating the content of releases -- instead, that subject is governed by state law and other federal statutes.[11]

[10] Existing Treasury Regulations contradict the United States' argument on this point, since they contemplate that a release may encompass all claims which an employee has against the employer, not just those claims arising out of the employee's decision to retire. *E.g.*, Treas. Reg. § 1.401(A)(4) - 4(b)(2)(ii)(B) (payment of benefits conditioned upon, *inter alia*, "execution of a waiver of rights under the Age Discrimination in Employment Act or other federal or state law . . ."). Moreover, respondent raised no issue below as to the scope of the release in this case. J.A. at 91 n.6.

[11] *See, e.g.*, 29 U.S.C. § 626(f)(1) (ADEA claims may not be waived "unless the waiver is knowing and voluntary"); Cal. Lab. Code § 5001 ("No release of liability or compromise agreement [of workers' compensation claims] is valid unless it is approved by the [California Workers' Compensation] appeals board or referee"). Lockheed's release would not, therefore, waive liability for "toxic torts" or "work-related injuries" due to California Labor Code § 5001. With respect to claims for "race or sex discrimination," the courts of appeals have uniformly held that "'public policy favors voluntary settlement of employment discrimination claims brought under Title VII.'" *Stroman v. West Coast Grocery Co.*, 884 F.2d 458, 460-61 (9th Cir. 1989), *cert. denied*, 498 U.S. 854 (1990), *quoting Rogers v. General Electric Co.*, 781 F.2d 452, 454 (5th Cir. 1986). *Cf. Newton v. Rumery*, 480 U.S. 386 (1987) (release of malicious prosecution claims in return for dismissal of criminal charges is not barred by public policy). Thus, it may be that a particular form of release will not be given legal effect or might only be partially effective under ever changing state and federal substantive law when challenged in collateral proceedings, but questions as to the enforceability of a release in particularized circumstances does not mean ERISA is violated nor does it require plan fiduciaries to play the role of state or federal judges rendering advisory opinions on whether all aspects of a release will be enforced. For example, even if Lockheed as plan sponsor desired the release it prepared in its

(continued...)

There is no need to fear the parade of horribles which respondent and his *amici* suggest if Lockheed's argument on this point is accepted. Contrary to NELA's suggestion, § 406 would continue to prohibit various transactions between plans and plan sponsors, including loans, sales, or leases. Moreover, there is no merit to NELA's argument that Lockheed's interpretation of ERISA § 406 would make it permissible to condition pension benefits upon the delivery of "valuable consideration" to fiduciaries, corporate executives, or union officials. NELA Brief at 7. There are other statutes which regulate this area, such as the anti-kickback provisions of 18 U.S.C. § 1954, and the Taft-Hartley Act, 29 U.S.C. § 186. NELA's hypothetical concern over improper payments can be resolved through these existing statutory prohibitions, not by judicially expanding ERISA § 406 to create a new category of prohibited transactions which is nowhere listed in the statute.

C. The Plan Fiduciaries Did Not Engage In A Prohibited Transaction Or Otherwise Breach A Fiduciary Duty By Paying Benefits In Accordance With The Non-Discretionary Terms Of The Plan Amendment.

The United States makes an additional argument -- which respondent apparently does not join -- that although Lockheed's Plan amendment was not fiduciary conduct under ERISA, the "implementation" of that lawfully adopted amendment might provide an independent basis for finding a breach of fiduciary duty. Brief for the United States at 11; *see also* Respondent's Brief at 7 (arguing that only a "false distinction" exists between plan

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11 (...continued)
sponsor capacity to release California employees' workers' compensation claims, it failed. Cal. Lab. Code § 5001.

amendment and implementation of the amended plan). The United States' argument should be rejected, because in this case the Plan administrator merely applied the non-discretionary eligibility criteria, mandated by the unambiguous terms of the Plan amendment, to determine which participants were entitled to enhanced pension benefits. "Implementation" of the lawful and non-discretionary terms of an ERISA plan cannot constitute a fiduciary breach. *See, e.g., Varity Corp.*, slip op. at 14 ("the primary function of the fiduciary duty is to constrain the exercise of *discretionary* powers which are controlled by no other specific duty imposed by the trust instrument or the legal regime") (emphasis in original); 29 C.F.R. § 2509.75-8, D-2 (a person does not become a fiduciary with respect to a plan by performing non-discretionary functions including, *inter alia*, "[a]pplication of rules determining eligibility for participation or benefits").

As discussed *supra*, the principal flaw to the United States' argument is that it would create an *ad hoc* approach based upon subjective judgments as to the wisdom of a particular plan's eligibility criteria rather than the statutory language of § 406 or any other portion of ERISA. The test proposed by the United States as to whether benefit payments to participants would breach a fiduciary duty relies upon vague concepts such as whether Lockheed received a benefit which employers "ordinarily" or "normally" receive from the existence of a pension plan. Brief for the United States at 17. No legal standard or line of decision is suggested which could guide plan sponsors, fiduciaries, or courts to make these *ad hoc* determinations. The fact that the United States disagrees with respondent and his other *amici* as to how this *ad hoc* standard should be applied demonstrates that this approach would only generate much confusion and endless litigation. *See* Brief *Amicus Curiae* of the Chamber of Commerce of the United States of America at 16-22.

Moreover, the United States' interpretation of § 406(a)(1)(D) would put plan administrators at risk of breaching their fiduciary duty, since they would then be required to rely upon subjective judgment rather than the terms of the plan when determining eligibility for benefits. *Curtiss-Wright*, 115 S. Ct. at 1231 ("plan administrators appear to have a statutory responsibility actually to run the plan in accordance with the currently operative, governing plan documents . . . "). The resulting disincentive to sponsors to increase or create new benefits for participants is exactly the opposite of what ERISA sought to accomplish.

When Congress enacted ERISA it specifically decided *not* to regulate the sponsor's motivation for creating or amending a plan. There is no text in ERISA which defines the "ordinary" or "normal" eligibility criteria for plan participation. The only eligibility criteria established by ERISA are the minimum participation and vesting standards, which are fully and undeniably satisfied by Lockheed's Plan and which are not at all implicated by the creation of the new benefits voluntarily chosen by eligible Plan participants. Beyond that, employers are free to design pension plans to suit their own unique circumstances, a flexibility which no doubt encourages employers to create new pension plans and expand existing plans. If Congress wished to further regulate the scope of benefit eligibility criteria it could no doubt do so, but so far it has not. ERISA § 406 should not now be judicially rewritten to regulate the form and content of employee release agreements when this subject is not addressed in the statutory language.[12]

[12] The United States also mentions the existence of an issue as to whether more consideration must be offered to employees who are older than age 40 to validly release ADEA claims. Brief for the United States at 22 n.15. *See generally DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719 (3d Cir.) (release is valid where same consideration was offered to employees of all ages), *cert. denied*, 116 S.Ct. 306 (1995). This issue is not presented here because the respondent never signed a release.

III. THE NINTH CIRCUIT'S APPLICATION OF *LANDGRAF* IS PLAINLY WRONG AND INCONSISTENT WITH THE IRS INTERPRETATION OF OBRA 1986.

On the second issue presented by the case, respondent argues that Congress expressly provided for retroactive application of OBRA 1986 and that the "default" rule of *Landgraf v. USI Film Products*, ___ U.S. ___, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994), does not come into play. Despite making this assertion, respondent fails to identify any language in OBRA 1986 which expressly provides for retroactive application, a result which is not surprising because there is no such statutory language. Instead, respondent relies chiefly upon the Ninth Circuit's misreading of the statutory phrase which prohibits an age-based reduction of "the rate of an employee's benefit accrual," 29 U.S.C. § 623(i)(1); 29 U.S.C. § 1054(b)(1)(H)(i), by arguing that the word "rate" actually means "the formula used to calculate an employee's accrued benefit." Respondent's Brief at 30.[13] This is just another way of saying that the "rate" of benefit accrual means the "total" benefit accrued. To interpret the statute this way, however, would be to change entirely the meaning of its plain language. Lockheed fully

[13] *Amici* for respondent attempt to support this position by pointing to language in OBRA 1986 permitting a plan to limit the number of years of participation or service taken into account for computing benefit accruals so long as the limitation is imposed without regard to age. AARP Brief at 19-20; NELA Brief at 21-27. This provision was added in order to ensure that the common practice of limiting the maximum number of years that could be taken into account for benefit accrual purposes (e.g., providing that only 30 years of service could be counted) would not be treated as a violation of the new benefit accrual rules. This provision, which concerns situations where years that would otherwise need to be counted for benefit accrual purposes may be ignored, has no relevance to the problem posed in this case--determining whether Congress intended that years before the effective date of OBRA 1986 need to be taken into account in the first place.

satisfied OBRA 1986 once it took effect because there has been no reduction in the rate of respondent's benefit accrual based on his age or any other factor once he became a participant. The Plan makes no such age based reduction and respondent conceded below that he has been paid benefits in accordance with the Plan.[14] The United States agrees with Lockheed that the court of appeals' interpretation reflects a "fundamental misunderstanding" of OBRA 1986, and that Lockheed complied in all respects with OBRA 1986 after it took effect. Brief for the United States at 27-28.

Respondent also errs by denying that the Ninth Circuit's decision conflicts with the IRS interpretation of OBRA 1986. Respondent's Brief at 37-38. Respondent concedes that the IRS's proposed regulation does not require that a plan retroactively credit an employee, such as respondent, for prior years of service if the employee was not a participant prior to the effective date of OBRA 1986. Respondent's Brief at 37. Respondent's further argument that a subsequent administrative interpretation -- IRS Notice 88-126 somehow changed this aspect of the proposed regulation is simply incorrect. The Notice expressly states that "the final regulations to be issued by the IRS . . . *will adopt the position taken in the proposed IRS regulations with respect to years of service that may not be disregarded because of age in determining benefits under noncontributory defined benefit plans*." IRS Notice 88-126, 1988-2 C.B. 538 (1988) (emphasis added). Since respondent concedes that the Proposed Regulation is adverse to his position, it is not surprising that he fails to acknowledge this portion of the Notice. The next sentence of the Notice (which is partially quoted in Respondent's Brief at page 38) does nothing to change this analysis -- it only notes that years of service completed by a *participant* in years before 1988 must be counted. Respondent was not a participant before 1988, so this does not apply to him. The United States agrees with Lockheed that the "Secretary of the Treasury has consistently interpreted Section 9203(a) to have only prospective effect," and that it should be accorded "substantial deference" as an authoritative administrative interpretation that taxpayers have reasonably relied upon since 1988. Brief for the United States at 24-25.

[14] In a footnote respondent argues that he was deprived of one year of participation because he was not given credit for his service from January 1, 1988 to December 24, 1988. This issue is not properly before the Court because respondent abandoned any claim for benefits under the terms of the Plan. J.A. at 63 n.1, 79. Moreover, respondent has clearly miscalculated when he was required to be made a participant under OBRA 1986. Lockheed's Plan Year starts on December 25. J.A. at 41, Plan § 1.20. OBRA 1986 required his participation for "plan years beginning on or after January 1, 1988, and only for service performed on or after such date," OBRA 1986 § 9204(b). Since the first Plan year under OBRA 1986 *started* December 25, 1988, respondent became a participant on that day and his January 1, 1988, to December 24, 1988 service properly was *not* counted.

Respondent also argues that forcing Lockheed to credit him for pre-1988 service would not constitute retroactive application of OBRA 1986. Respondent's Brief at 39. Specifically he seeks a determination that his accrued benefit increased from zero on December 24, 1988 to a fully vested benefit on December 25, 1988 that reflects his service with Lockheed from 1979 onward. Under respondent's theory, he would have been fully entitled to this benefit if he had retired December 25, 1988. Since this new benefit occurs entirely because new consequences are assigned to events that occurred before the effective date of OBRA 1986, it is obvious that respondent is arguing for retroactive application of the statute.

Moreover, respondent's argument ignores the economic fact that pension funds operate by setting aside money today to pay benefits in future years, so any change in the benefit accrual rules for past service necessarily constitutes retroactive application of a statute. "[T]he rules that apply to [pension] funds should not be

applied retroactively unless the legislature has plainly commanded that result." *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 721 (1978); *see also Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 1105-07 (1983) (Opinion of Powell, J.). The reason for this rule is that "[r]etroactive liability could be devastating for a pension fund." *Manhart*, 435 U.S. at 722. Moreover, it is no answer for respondent to argue that Lockheed's Plan in particular could afford to pay the additional liability, since the Court's ruling will affect countless other pension plans with varying degrees of solvency and could result in an aggregate unexpected liability exceeding $1 billion. *Id.* at 722 n.42. Respondent's attempt to avoid the presumption against retroactive application of a new pension benefit accrual rule should therefore be rejected.

CONCLUSION

Petitioners urge the Court to reverse the decision of the Ninth Circuit, and remand the case with instructions to affirm the district court's dismissal of Counts I, II, and III of the complaint.

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Respectfully submitted,

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